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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 SHIRLEY IRBY,) NO. CV 06-02225 SS
12 Plaintiff,)
13 v.) MEMORANDUM DECISION AND ORDER
14 MICHAEL J. ASTRUE,)
15 Commissioner of the Social)
16 Security Administration,)
17 Defendant.)
18

19
20 INTRODUCTION
21

22 Plaintiff Shirley Irby ("Plaintiff") filed this action on
23 April 12, 2006, seeking to overturn the decision of the
24 Commissioner of the Social Security Administration¹ (hereinafter
25 the "Commissioner" or the "Agency") denying her application for
26 Disability Insurance benefits. Alternatively, she asks for a

27
28 ¹ Michael J. Astrue has become the Commissioner of Social
Security Administration. Pursuant to Rule 25(d)(1) of the Federal
Rules of Civil Procedure, he is substituted for Commissioner Jo
Anne B. Barnhart as the defendant in this suit. F.R.C.P. 25(d)(1).
The instant action survives "notwithstanding any change in the
person occupying the office of Commissioner of Social Security[.]"
42 U.S.C. § 405(g).

1 remand. The parties have consented, pursuant to 28 U.S.C. §
2 636(c), to the jurisdiction of the undersigned United States
3 Magistrate Judge. Pursuant to the Court's Case Management Order,
4 the parties filed a joint stipulation ("Jt. Stip.") on February 5,
5 2007. For the reasons stated below, the decision of the
6 Commissioner is AFFIRMED.

7 8 **PROCEDURAL HISTORY** 9

10 On February 21, 2003, Plaintiff filed an application for
11 Disability Insurance Benefits ("DIB"). (AR 48-50). Plaintiff
12 alleged that she became disabled on October 19, 1999 due to "severe
13 back problems." (AR 48, 69). Plaintiff later amended her alleged
14 onset date to coincide with her February 21, 2003 application date.
15 (AR 14, 260).

16
17 After Plaintiff's claims were denied initially and on
18 reconsideration, she requested a hearing before an administrative
19 law judge ("ALJ"). (AR 24-27, 29-33, 36). On March 30, 2005, ALJ
20 Zane A. Lang held an administrative hearing. (AR 42, 220).
21 Plaintiff appeared with counsel and testified. (AR 224-54). The
22 ALJ also heard testimony from vocational expert ("VE") Heidi Paul.
23 (AR 255-58, 260). On November 2, 2005, the ALJ issued a decision
24 denying benefits. (AR 14-20). Plaintiff sought review before the
25 Appeals Council, which affirmed the decision on February 15, 2006,
26 making ALJ Lang's decision the final decision of the Agency. (AR
27 5-7). Plaintiff filed the instant action on April 12, 2006.

FACTUAL BACKGROUND

Plaintiff was born on September 21, 1940, and was sixty-four years old at the time of the hearing.² (AR 48, 233). Plaintiff earned a bachelor's degree and also completed some work toward a master's degree. (AR 75, 234). Plaintiff's prior work history included employment as a preschool teacher, a home care worker, and a clerk for her husband's construction business. (AR 70, 224-31).

A. Relevant Medical History

In her application for benefits, Plaintiff claimed that she was disabled due to "severe back problems." (AR 69). Plaintiff also suffered from hypertension and hypothyroidism. (AR 167). She had a history of breast cancer with a mastectomy in 1983 and colon cancer with a colon resection in 1995. (AR 73, 167). Plaintiff obtained treatment for her lower back pain and other conditions from her family doctor, Dr. Oscar Moore, Jr. (AR 71, 135-42). Plaintiff also saw Dr. Michael Hamilton on at least one occasion for a case of bronchitis. (AR 205). Dr. Hamilton completed a "certificate" opining that Plaintiff was permanently disabled, and enumerating diagnoses of chronic back pain, anxiety, hypertension, hypothyroidism, history of radical mastectomy, and history of sigmoid colon cancer. (AR 202).

² While the ALJ stated that Plaintiff was born on September 18, 1940, which date he may have obtained from certain documents, most documents in the record, including Plaintiff's application, indicate that her birth date was September 21, 1940. (AR 48, 63, 78).

1 Plaintiff also sought psychological care from Dr. Marie Moore.
2 Plaintiff complained of depression and anxiety she attributed to
3 her health problems and the murder of her son. (AR 192-93, 197).
4 Plaintiff stated that both Dr. Marie Moore and Dr. Oscar Moore
5 prescribed Xanax.³ (AR 241-42).
6

7 **B. Relevant State Agency Physician Evaluations**
8

9 A State Agency doctor completed a Physical Residual Functional
10 Capacity Assessment on June 30, 2003. (AR 117-24). That doctor⁴
11 opined that Plaintiff could lift or carry ten pounds occasionally
12 or less than ten pounds frequently, stand or walk for two hours in
13 an eight-hour workday, and sit for about six hours in an eight-hour
14 workday. (AR 118). The State Agency doctor also found that
15 Plaintiff should be limited to stooping, kneeling, crouching,
16 crawling, or climbing ramps or stairs only occasionally, never
17 climbing ladders, ropes, or scaffolds, and never being exposed to
18 hazardous machinery or heights. (AR 119, 121). The doctor stated
19 that there were no significant differences between the doctor's
20 conclusions and those of Plaintiff's treating doctors. (AR 123).
21

22 On February 18, 2004, Plaintiff was examined by consulting
23 physician Dr. Robert Hunt. (AR 147-54). Plaintiff complained of
24

25 ³ Xanax, also known as Alprazolam, is used to treat anxiety
26 and panic disorders. Drugs and Treatments (June 25, 2007) <
27 <http://www.webmd.com/drugs/search>>.

28 ⁴ The State Agency doctor is not identified by name in the
record, and his or her signature on the form is illegible.

1 low back pain and muscle spasms, with pain and numbness radiating
2 into her legs and feet. (AR 149-50). Dr. Hunt observed that
3 Plaintiff's gait was "slow, deliberate, and antalgic," and that she
4 complained of tenderness when walking on her heels. (AR 151, 152).
5 He found no palpable muscle spasm, but noted tenderness over the
6 lumbar spine. (AR 152). Dr. Hunt administered several tests
7 including sitting and supine leg raising, Fajersztajn's test,
8 FABERE and reverse FABERE tests, Tinel's sign over the femoral and
9 peroneal nerves and the posterior tibia, and Apley's grind test.
10 (AR 152-53). Dr. Hunt assessed Plaintiff as suffering lumbosacral
11 strain with secondary radiculopathy to the legs. (AR 154).
12

13 Dr. Hunt completed a form assessing Plaintiff's functional
14 limitations. (AR 155). He found that Plaintiff should be limited
15 to sitting, standing, or walking for one half hour at a time or one
16 and one half hours in an eight-hour workday. (Id.). She should
17 not lift or carry more than five pounds on an occasional basis or
18 push or pull controls with her arms or legs. (Id.). She should
19 not engage in fine manipulation, bending and reaching should be
20 only occasional and she should never squat, crawl, or climb.
21 (Id.). She should limit herself to moderate exposure to dust,
22 fumes, and gases and should avoid activities involving unprotected
23 heights, moving machinery, marked changes in temperature or
24 humidity, or driving. (Id.).
25

26 In June 2005, after Plaintiff's hearing before the ALJ,
27 consultative physician Dr. Celeste Emont evaluated Plaintiff. (AR
28 206-10). Dr. Emont noted that Plaintiff had been prescribed

1 Methocarbamol, Naproxen, Vicodin⁵, and Xanax, among other
2 medications to control her hypothyroidism, hypertension, and other
3 conditions. (AR 206-07). She observed that Plaintiff had a normal
4 gait and walked in without any assistive device. (AR 207, 209).
5 Dr. Emont concluded that Plaintiff suffered from left lumbar
6 muscular spasm, depression, and anxiety. (AR 209). With respect
7 to Plaintiff's back, she found mild tenderness in the left lumbar
8 area, slow and deliberate heel toe walk without back pain, ninety
9 degrees back flexion without pain, and thirty-five degrees lateral
10 bending. (Id.). Dr. Emont found no neurological deficits. (Id.).
11

12 Dr. Emont completed a form assessing Plaintiff's functional
13 limitations. (AR 212-15). She limited Plaintiff to lifting or
14 carrying twenty-five pounds occasionally and ten pounds frequently,
15 standing or walking about six hours in an eight-hour workday,
16 sitting with the need to alternate sitting and standing, limited
17 pushing and pulling with lower extremities, never climbing or
18 balancing, and occasionally kneeling, crouching, crawling, or
19 stooping. (AR 212-15).
20

21 Following Dr. Emont's examination and assessment, a
22 radiological study was made of Plaintiff's lumbosacral spine. (AR
23 211). The radiologist found moderate discogenic disease at L4-L5
24 with sclerosis and narrowing of the lower apophyseal and S-I
25 joints, as well as splinting indicative of muscle spasm. (Id.).
26

27 ⁵ Methocarbamol is a muscle relaxant. Naproxen is used to
28 relieve pain and inflammation. Vicodin is a pain reliever. Drugs
and Treatments (June 25, 2007)< <http://www.webmd.com/drugs/search>>.

1 **C. Plaintiff's Testimony**

2
3 Upon questioning by the ALJ, Plaintiff testified about her
4 work history. Her longest employment was as a pre-school and
5 primary school teacher. (AR 230-33). She explained that she
6 stopped teaching in 1999 because of pain in her lower back,
7 shoulders, arms, and legs. (AR 242-43). She testified that she
8 qualified for retirement based on disability. (AR 252-53).
9 However, she earlier testified that her retirement from Los Angeles
10 Unified Schools was based upon "years of service." (AR 242)(See
11 also AR 237 (retirement was "regular retirement")).

12
13 Plaintiff also described her most recent work as a clerk for
14 her husband's construction business. (AR 224-25). She explained
15 that her duties included answering the phone, taking messages, and
16 doing some filing. (Id.). She reported that she did it "to help
17 him out" and only for a few months. (AR 226). She testified that
18 she worked "maybe one week" in 1999 and "two to three months" in
19 2000 and 2001. She also worked "two to three months" for her
20 husband in 2002, just prior to her alleged onset date in 2003. (AR
21 227-28). Plaintiff further reported that she had previously
22 provided home care to her mother for a few months a year from 1992
23 until 1995. (AR 225, 228-30).

24
25 Plaintiff testified that she sometimes did "light chores"
26 around the house, including washing dishes, dusting, making the
27 bed, and laundry with her husband's help. (AR 234-35). She
28 testified that she did not cook, vacuum, sweep, mop, or take out

1 the trash. (Id.). Plaintiff noted that she drove very little.
2 (Id.). She reported that she enjoyed reading and writing. (AR
3 237). Plaintiff also mentioned that she watched television and
4 "prayed a lot." (Id.). She testified that she would visit with
5 family that came to visit and occasionally talk on the phone. (AR
6 238-39). Plaintiff attends church "maybe once a month." (AR 238).

7
8 Plaintiff testified about her medical history, including
9 breast and colon cancer. (AR 236). She reported that her
10 medications had included Vicodin, thyroid medication, Xanax,
11 Zantac, and Ambien. (AR 239-40). Plaintiff complained that she
12 was unable to work because of pain in her back, shoulders, and
13 arms. (AR 246). She testified that pain medication provided some
14 relief, but that it made her drowsy, due to which she would sleep
15 two to three hours during the day. (AR 247-48). Plaintiff
16 estimated that she could walk about a half a block and that she
17 could stand for twenty-five to thirty minutes while washing dishes.
18 (AR 248). She explained that she needed a cane for walking and
19 standing. (AR 248-49).

20
21 Plaintiff testified that she had seen a psychologist from
22 August through December 2004. (AR 240-41). She decided to seek
23 psychological care to deal with the frustration caused by cancer
24 and deteriorating health, and to deal with the then-recent death of
25 her son. (AR 243-44, 245-46). Plaintiff reported that she stopped
26 seeing the psychologist because she wanted to try to "get [her]
27 life together on [her] own." (AR 241). She complained that she
28

1 was still having psychological problems, and that she had become
2 forgetful. (AR 249-50).

3
4 **D. VE's Testimony**

5
6 VE Heidi Paul explained that Plaintiff's prior work as a
7 teacher would be classified as "Attendant, Children's Institution,"
8 and was categorized as SVP three and at a medium exertional level.
9 (AR 256). She testified that the work Plaintiff performed for her
10 husband would be classified as "Clerical Worker," which was
11 performed at a sedentary level, and was categorized as SVP three.
12 (AR 257). She classified Plaintiff's work as a "Home Health Aide"
13 as SVP three and at a light exertional level. (Id.).

14
15 The ALJ presented the following hypothetical to VE Paul:

16
17 [A]ssume a hypothetical individual of the [Plaintiff's]
18 age, education and work experience, who could lift 10
19 pounds occasionally, less than 10 pounds frequently,
20 stand and/or walk 2 hours out of an 8 hour day, sit 6
21 hours out of an 8 hour day, needs a hand held device,
22 assistive device for walking long distances, no climbing
23 ladders, ropes and scaffolds -

24

25 No climbing ladders, ropes and scaffolds, no balancing,
26 occasional climbing ramps and stairs, occasional
27 stooping, kneeling, crouching, and, let's see, and let's

1 say occasional crawling. Could this hypothetical
2 individual perform any of the claimant's past work?

3
4 (AR 257). The VE reported that Plaintiff could perform her past
5 work as a clerical worker as she had previously performed it. (AR
6 258). The ALJ then modified the hypothetical, asking the VE to
7 assume a hypothetical individual of the Plaintiff's age, education,
8 and work experience:

9
10 that because of medication has to nap two to three hours
11 during the work day, and has chronic pain that - and
12 difficulties concentrating that prevents her from working
13 five days a week, eight hours a day, or at the level of
14 substantial gainful activity

15
16 (AR 260). VE Paul testified that such an individual could not
17 perform Plaintiff's past work or any other work.

18
19 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

20
21 To qualify for disability benefits, a claimant must
22 demonstrate a medically determinable physical or mental impairment
23 that prevents him from engaging in substantial gainful activity⁶
24 and that is expected to result in death or to last for a
25 continuous period of at least twelve months. Reddick v. Chater,

26 _____
27 ⁶Substantial gainful activity means work that involves doing
28 significant and productive physical or mental duties and is done
for pay or profit. 20 C.F.R. §§ 404.1510, 416.910.

1 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. §
2 423(d)(1)(A)). The impairment must render the claimant incapable
3 of performing the work he previously performed and incapable of
4 performing any other substantial gainful employment that exists in
5 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th
6 Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

7
8 To decide if a claimant is entitled to benefits, an ALJ
9 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The
10 steps are:

11
12 (1) Is the claimant presently engaged in substantial
13 gainful activity? If so, the claimant is found not
14 disabled. If not, proceed to step two.

15 (2) Is the claimant's impairment severe? If not, the
16 claimant is found not disabled. If so, proceed to
17 step three.

18 (3) Does the claimant's impairment meet or equal one of
19 list of specific impairments described in 20 C.F.R.
20 Part 404, Subpart P, Appendix 1? If so, the
21 claimant is found disabled. If not, proceed to
22 step four.

23 (4) Is the claimant capable of performing his past
24 work? If so, the claimant is found not disabled.
25 If not, proceed to step five.

26 (5) Is the claimant able to do any other work? If not,
27 the
28

1 claimant is found disabled. If so, the claimant is
2 found not disabled.

3
4 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262
5 F.3d 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R. §§
6 404.1520(b)-(g)(1) & 416.920(b)-(g)(1).

7
8 The claimant has the burden of proof at steps one through
9 four, and the Commissioner has the burden of proof at step five.
10 Bustamante, 262 F.3d at 953-54. If, at step four, the claimant
11 meets his burden of establishing an inability to perform past work,
12 the Commissioner must show that the claimant can perform some other
13 work that exists in "significant numbers" in the national economy,
14 taking into account the claimant's residual functional capacity
15 ("RFC"),⁷ age, education, and work experience. Tackett, 180 F.3d
16 at 1098, 1100; Reddick, 157 F.3d at 721; 20 C.F.R. §§
17 404.1520(g)(1), 416.920(g)(1). The Commissioner may do so by the
18 testimony of a vocational expert or by reference to the Medical-
19 Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P,
20 Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel,
21 240 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both
22 exertional (strength-related) and nonexertional limitations, the
23 Grids are inapplicable and the ALJ must take the testimony of a

24
25
26

⁷ Residual functional capacity is "what [one] can still do
27 despite [his] limitations" and represents an "assessment based upon
28 all of the relevant evidence." 20 C.F.R. §§ 404.1545(a),
416.945(a).

1 vocational expert. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir.
2 2000).

3
4 **THE ALJ'S DECISION**

5
6 At step one, the ALJ found that Plaintiff had not engaged in
7 substantial gainful employment since her alleged February 21, 2003
8 onset date. (AR 19). At step two, the ALJ found that Plaintiff
9 had no severe mental impairment, but did have hypertension,
10 hypothyroidism, obesity, a history of colon cancer in 1995, and low
11 back pain. (AR 17, 20). At step three, the ALJ found that
12 Plaintiff's impairments, either singly or in combination, did not
13 meet or equal the requirements of any impairment listed at 20
14 C.F.R. Part 404, Subpart P, Appendix 1. (AR 20).

15
16 At step four, the ALJ adopted a RFC for Plaintiff limiting her
17 only by inability to lift more than ten pounds, stand or walk
18 longer than two hours in an eight-hour work day, sit longer than
19 six hours in an eight-hour work day, do more than occasional
20 stooping, kneeling, crouching, or crawling, climb ladders, ropes,
21 and scaffolds, do more than occasional climbing of ramps or stairs,
22 balance, and by a need to use an assistive device for walking long
23 distances. (AR 15-16, 20). Based upon this assessment, the ALJ
24 concluded that Plaintiff was able to perform her past relevant work
25 as a clerk. (AR 16, 20). Accordingly, the ALJ concluded that
26 Plaintiff was not under a "disability" within the meaning of the
27 Social Security act at any time prior to her date last insured.
28 (AR 20).

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The court may set aside the Commissioner's decision when the ALJ's findings are based on legal error or are not supported by substantial evidence in the record as a whole. Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1097); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." Id. (citing Jamerson, 112 F.3d at 1066; Smolen, 80 F.3d at 1279). To determine whether substantial evidence supports a finding, the court must "'consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (citing Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing that conclusion, the court may not substitute its judgment for that of the Commissioner. Reddick, 157 F.3d at 720-21 (citing Flaten v. Sec'y, 44 F.3d 1453, 1457 (9th Cir. 1995)).

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\\

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DISCUSSION

Plaintiff complains that the ALJ's decision should be overturned for several reasons. Petitioner argues the ALJ erred in finding that Plaintiff's past work as a clerk constituted substantial gainful activity, that the ALJ failed to properly consider the opinions of various physicians and Plaintiff's own testimony, and that the ALJ's assessment of her residual functional capacity was not supported by substantial evidence. (Jt. Stip. at 3).

A. The ALJ Properly Determined That Plaintiff's Past Work Was "Relevant" and Substantial Gainful Activity

Plaintiff contends that the ALJ erred by finding that her previous employment as a clerk for her husband's construction business constituted past relevant work and "substantial gainful activity." (Jt. Stip. at 3). Specifically, Plaintiff complains that it was not substantial gainful activity ("SGA") because it was performed under special conditions and because she was only employed because of a family relationship. (Jt. Stip. at 4). The Court finds that Plaintiff's claim lacks merit.

For past work to be "relevant," it must have been done within the last fifteen years, lasted long enough for the claimant to learn to do it, and be substantial gainful activity. 20 C.F.R. § 404.1560(b)(1); SSR 82-62, 1982 WL 31386, *2 (November 30, 1981). The duration requirement is met if the length of the employment was

1 sufficient enough "for the worker to have learned the techniques,
2 acquired information, and developed the facility needed for average
3 performance in the job situation." SSR 82-62, 1982 WL 31386, *2.
4 The length of time this would take depends on the nature and
5 complexity of the work. Id.

6
7 "A job qualifies as past relevant work only if it involved
8 substantial gainful activity." Lewis v. Apfel, 236 F.3d 503, 515
9 (9th Cir. 2001). The Regulations set forth guidelines for
10 determining whether past work constituted substantial gainful
11 activity. If a claimant's income exceeds a certain monthly
12 average, the past work is presumptively SGA. 20 C.F.R. §
13 404.1574(a)(1); Corrao v. Shalala, 20 F.3d 943, 948 (9th Cir.
14 1994).

15
16 This presumption may be rebutted, however, and it does not
17 "relieve an ALJ of the duty to develop the record fully and
18 fairly.'" Corrao, 20 F.3d at 948 (quoting Dotson v. Shalala, 1
19 F.3d 571, 576 (7th Cir. 1993)). The presumption may be rebutted if
20 the claimant's wages were "subsidized" and did not reflect the true
21 value of the work performed. 20 C.F.R. § 404.1574(a)(2). In such
22 circumstances, the ALJ considers only the amount that was directly
23 related to the claimant's productivity. 20 C.F.R. §
24 404.1574(a)(2). The presumption may also be rebutted by other
25 factors, including "the responsibilities and skills required to
26 perform the work, the amount of time the individual spends working,
27 the quality of the individual's work, [and] special working
28 conditions. . . ." Corrao, 20 F.3d at 948.

1 The ALJ found that Plaintiff's prior work constituted SGA
2 based upon her income and the fact that Plaintiff held the job long
3 enough to learn it. (AR 15). The ALJ noted that Plaintiff's
4 income working for her husband's business was high enough to create
5 the presumption of SGA. (AR 15). The ALJ summarized the following
6 work and income history based upon Plaintiff's work as a clerk for
7 her husband:

8
9 * one week in 1999 and had \$3326.00 reported earnings in 1999

10 * two to three months in 2000 and had \$3326.00 reported
11 earnings for 2000

12 * two to three months in 2001 and had \$3326.00 reported
13 earnings for 2001

14 * two to three months in 2002 and had \$1663 reported earnings
15 for 2002.

16
17 (AR 15, AR 226-228)(See Exhibit 2D, p. 6). The regulations provide
18 a presumption of substantial gainful activity if the claimant
19 earned more than \$700 a month after December 2000. See 20 C.F.R.
20 416.974(b)(2) & 20 C.F.R. 416.975(a)(2)(c). Plaintiff's earnings,
21 therefore, satisfied the presumption. In addition, she held the
22 job long enough to learn it and performed it within the last
23 fifteen years. As such, the ALJ found that this work was
24 substantial gainful activity and constituted past relevant work.

25
26 Plaintiff contends that her wages were "heavily subsidized"
27 and that she worked under special conditions because her husband
28 was her employer. (Jt. Stip. at 3-5). Plaintiff further argues,

1 without evidentiary support, that she would not have been able to
2 perform the job but for special circumstances. The only relevant
3 evidence in the record regarding Plaintiff's work were her earnings
4 and her testimony that she worked approximately a week in 1999, and
5 two to three months in each of 2000, 2001, and 2002. (AR 227-28).
6

7 Plaintiff asserts that, at most, her work for her husband's
8 company constitutes an unsuccessful work attempt. (Jt. Stip. at 3-
9 5). A finding that work of three months or less constituted an
10 unsuccessful work attempt, and therefore was not substantial
11 gainful activity, is dependent upon employment being cut short due
12 to the claimant's disability or the removal of special
13 circumstances that allowed the claimant to work notwithstanding her
14 disability. 20 C.F.R. § 404.1574(c)(1)-(3); SSR 05-02, 2005 WL
15 568616 at *2 (February 28, 2005). Significantly, Plaintiff does
16 not even argue, much less present evidence to demonstrate that she
17 stopped working for her husband due to her condition. In fact,
18 Plaintiff's testimony implies that she worked for her husband as
19 needed, "just to help him out," not that she was unable to maintain
20 sustained work due to her impairments. (AR 226). As such,
21 substantial evidence in the record supports the ALJ's finding that
22 Plaintiff's work as a clerk was substantial gainful activity.
23

24 In sum, Plaintiff's work as a clerk was performed within the
25 past fifteen years, lasted long enough for Plaintiff to learn the
26 work, and constituted substantial gainful activity. Accordingly,
27 the ALJ's finding that Plaintiff's work as a clerk was "past
28

1 relevant work" was not legally erroneous and was supported by
2 substantial evidence in the record.

3
4 **B. The ALJ Properly Considered The Opinions Of Treating,**
5 **Examining, And Non-Examining Physicians**
6

7 Plaintiff complains that the ALJ improperly rejected the
8 opinions of treating physicians Dr. Oscar Moore, Jr. and Dr.
9 Michael Hamilton and of examining physician Dr. Robert Hunt. (Jt.
10 Stip. at 7). Plaintiff also asserts that the ALJ gave too much
11 weight to the opinions of the non-examining State Agency physician
12 and to examining physician Dr. Emont's opinion. The Court
13 disagrees.

14
15 Although the treating physician's opinion is entitled to great
16 deference, it is "not necessarily conclusive as to either the
17 physical condition or the ultimate issue of disability." Morgan v.
18 Comm'r of Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999). If
19 the treating doctor's opinion is not contradicted by another
20 doctor, it may be rejected only for "clear and convincing" reasons
21 supported by substantial evidence in the record. Lester v. Chater,
22 81 F.3d 821, 830 (9th Cir. 1995) (citing Baxter v. Sullivan, 923
23 F.2d 1391, 1396 (9th Cir. 1991)). Even when the treating doctor's
24 opinion is contradicted by the opinion of another doctor, the ALJ
25 may properly reject the treating doctor's opinion by providing
26 "'specific and legitimate reasons' supported by substantial
27 evidence in the record for so doing." Id. (citing Murray v.
28 Heckler, 722 F.2d 499, 502 (9th Cir. 1983)). Like the opinion of

1 a treating doctor, the opinion of an examining doctor, even if
2 contradicted by another doctor, can only be rejected for specific
3 and legitimate reasons that are supported by substantial evidence
4 in the record. Id. at 830-31.

5
6 In addition, the ALJ need not accept the opinion of any
7 physician, including a treating physician, if that opinion is
8 brief, conclusory, and inadequately supported by clinical findings.
9 See Matney v. Sullivan, 981 F.2d 1016, 1019 (9th Cir. 1992). Where
10 the opinion of the claimant's treating physician is contradicted,
11 and the opinion of a nontreating source is based on independent
12 clinical findings that differ from those of the treating physician,
13 the opinion of the nontreating source may itself be substantial
14 evidence. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995).
15 "It is then solely the province of the ALJ to resolve the
16 conflict." Id. When presented with conflicting medical opinions,
17 the ALJ must determine credibility and resolve the conflict.
18 Batson v. Commissioner of Social Security Administration, 359 F.3d
19 1190, 1195 (9th Cir. 2004) (citing Matney). Greater weight must
20 be given to the opinion of treating physicians, and in the case of
21 a conflict "the ALJ must give specific, legitimate reasons for
22 disregarding the opinion of the treating physician."

23
24 Here, the ALJ concluded that the opinions of treating
25 physicians Dr. Oscar Moore, Jr. and Dr. Michael Hamilton, and
26 consultative examiner Dr. Robert Hunt were "completely contradicted
27 by the opinion of a consultative examiner and a State Agency
28 doctor." (AR at 16). The ALJ also found that all three treating

1 doctor opinions were "not supported by the overall record." (AR
2 16).

3
4 **1. The ALJ Properly Rejected The Opinions Of Dr. Hamilton,**
5 **Dr. Moore, and Dr. Hunt**
6

7 While Plaintiff identifies Dr. Michael Hamilton as a treating
8 physician, the only documents in the record relating to his care
9 are a cursory disability form stating that Plaintiff was
10 permanently disabled and that she was diagnosed with "chronic back
11 pain," and brief examination notes that appear to relate to a case
12 of bronchitis. (AR 202, 205). Plaintiff herself admits that she
13 only had two visits with Dr. Hamilton and that he was "hardly
14 qualified [] as an expert on [P]laintiff's physical health." (Jt.
15 Stip. at 9).
16

17 Given the complete absence of any specific findings or
18 explanation of his conclusion that Plaintiff was "disabled," the
19 Court finds no error in the ALJ's rejection of Dr. Hamilton's bald
20 conclusion. (AR 202). See Magallanes v. Bowen, 881 F.2d 747, 751
21 (9th Cir. 1989) (finding that the ALJ need not consider conclusory
22 opinions); see also Crane v. Shalala, 76 F.3d 251, 253 (9th Cir.
23 1996) (holding that the ALJ properly rejected doctor's opinion
24 because they were check-off reports that did not contain any
25 explanation of the bases of their conclusions). A doctor's
26 conclusory statement that an individual is disabled is not binding
27 upon the agency. 20 C.F.R. § 404.1527(e)(1) ("A statement by a
28

1 medical source that you are 'disabled' or 'unable to work' does not
2 mean that [the Agency] will determine that you are disabled.").
3

4 Dr. Moore's and Dr. Hunt's opinions were contradicted by the
5 opinion of Dr. Emont, an examining physician, who based her report
6 on independent findings including a physical examination and
7 musculoskeletal assessment of Plaintiff. (See AR 206-09). Dr.
8 Moore opined that Plaintiff was permanently disabled. (AR 142).
9 Dr. Hunt noted that Plaintiff would be unable to perform even
10 sedentary work. (AR 155). Specifically, Dr. Hunt found that
11 Plaintiff could only sit, stand, or walk for one thirty minutes at
12 a time and for one and one half hours a day total. (Id.).
13

14 Dr. Emont disagreed. She found that Plaintiff was not in
15 distress and that she walked without assistance. (AR 207). Dr.
16 Emont reported that Plaintiff was only limited her by her inability
17 to lift and carry more than twenty-five pounds on an occasional
18 basis and ten pounds on a frequent basis, by her inability to
19 stand/walk for more than six hours in an eight-hour day, by her
20 need to alternate sitting and standing to relieve pain and
21 discomfort, by her limited ability to push or pull with her lower
22 extremities, by her inability to climb and balance and to only
23 occasionally kneel, crouch, crawl or stoop. (AR 212-13). As such,
24 Dr. Emont's opinion may itself be substantial evidence supporting
25 the ALJ's decision to reject the opinions of Dr. Moore and Dr.
26 Hunt. See Andrews, 53 F.3d at 1041.
27
28

1 Moreover, the ALJ gave specific and legitimate reasons for
2 rejecting the opinions of Dr. Moore and Dr. Hunt. He found that
3 their opinions were not supported by the overall record.
4 Specifically, the ALJ noted that there was no evidence of
5 functional limitations due to Plaintiff's hypertension and
6 hypothyroidism. (AR 16). Based upon the medical evidence, both
7 conditions were "asymptomatic" and controlled with medication.

8
9 The ALJ observed that Plaintiff has had no recurrence of her
10 breast and colon cancer. (Id.). The medical evidence shows that
11 she was treated for breast cancer in 1984 and for colon cancer in
12 1995, with no recurrence and no limitations stemming from these
13 illnesses. (AR 16).

14
15 He described Plaintiff's treatment for low back pain as
16 "sporadic" and "conservative."⁸ (Id.); see also Johnson v.
17 Shalala, 60 F.3d 1428, 1432 (finding that conservative treatment
18 suggests lower level of pain and functional limitation). The ALJ
19 also determined that the evidence did not show that Plaintiff had
20 persistent abnormalities in gait or significant neurological
21 deficits.

22
23 He further observed that when Plaintiff underwent a
24 consultative orthopedic examination in 2005, she was reported to be

25
26 ⁸ The ALJ outlined that Petitioner had "gaps" in medical
27 treatment from April 1, 2003 through September 14, 2003 (over five
28 months), from March 23, 2004 through January 28, 2005 (over ten
months), and from March 30, 2005 through the date of the decision
(over six months). (AR 17).

1 "in no acute distress." She walked into the examining room without
2 any assistance, although she did have spasm and mild tenderness in
3 her back. An x-ray revealed moderate discogenic disease at L4-L5.
4 However, the straight-leg raising test was negative and Plaintiff
5 demonstrated normal motion in all of her extremities. Her motor
6 strength and sensation were intact. (AR 16-17).

7
8 Relying on both her medical history of sporadic treatment and
9 the examination of the consultative doctor, the ALJ properly
10 resolved the conflict between the treating doctor's opinion and the
11 consultative doctor's opinion. Substantial evidence in the record
12 supports the ALJ's rejection of the treating doctor's opinion.

13
14 In sum, the ALJ gave specific and legitimate reasons for
15 rejecting the opinions of Dr. Hunt and Dr. Moore. Their opinions
16 were contradicted by Dr. Emont, an examining consultative
17 physician, who based her report on independent medical findings.
18 Also, the ALJ correctly rejected Dr. Hamilton's conclusory
19 assessment of Plaintiff's limitations. As such, there is
20 substantial evidence in the record to support the ALJ's rejection
21 of the opinions of Dr. Moore, Dr. Hunt, and Dr. Hamilton.

22
23 **2. The ALJ Appropriately Considered The Opinions Of Dr.**
24 **Emont And The State Agency Doctor**
25

26 As discussed above, Dr. Emont's report was based on
27 independent medical findings. Specifically, Dr. Emont took a
28 medical history from Plaintiff. (AR 206-17). She also conducted

1 a physical examination including exams of Plaintiff's speech,
2 hearing, neck, skin, chest, eyes, and mouth. (AR 207-08). Dr.
3 Emont also performed various musculoskeletal assessments including
4 an assessment of Plaintiff's handgrip, shoulder abduction, elbow
5 flexion, wrist dorsi flexion, wrist palmer flexion, knee flexion,
6 ankle dorsi flexion, and ankle planter flexion. (AR 208). She
7 examined Plaintiff's back and found mild tenderness and muscle
8 spasm at the left lumbar area, that heel toe was slow and
9 deliberate, that Plaintiff could walk on heels and toes without
10 pain, that lateral bending was thirty-five degrees bilaterally, and
11 that back flexion was ninety degrees from an upright position. (AR
12 209). As Dr. Emont's opinion contradicted the opinions of Dr. Hunt
13 and Dr. Moore and was based on independent medical findings, Dr.
14 Emont's opinion may itself be substantial evidence supporting the
15 ALJ's determinations. See Andrews, 53 F.3d at 1041. The ALJ,
16 therefore, did not err by rejecting the opinions of Dr. Moore and
17 Dr. Hunt in favor of Dr. Emont's opinion.

18
19 Further, the ALJ did not err by crediting the opinion of the
20 State Agency doctor. Nonexamining physician's opinions "with
21 nothing more" cannot constitute substantial evidence. Andrews, 53
22 F.3d at 1042. However, this does not mean that the opinions of
23 nonexamining sources and medical advisors are entitled to "little"
24 or no weight. Id. at 1041. Reports of a nonexamining advisor
25 "need not be discounted and may serve as substantial evidence when
26 they are supported by other evidence in the record and are
27 consistent with it." Id. Here, the State Agency Doctor's opinion
28 is consistent with the opinion of Dr. Emont. As such, the ALJ did

1 not commit error by crediting the opinion of the State Agency
2 doctor.

3
4 Plaintiff argues that the ALJ inexplicably adopted the more
5 restrictive RFC findings of the State Agency doctor instead of Dr.
6 Emont's findings. (Jt. Stip at 13). However, the ALJ specifically
7 notes that he was "[g]iving the [Plaintiff] the benefit of the
8 doubt" by adopting the more restrictive RFC. (AR 15).
9 Accordingly, the ALJ did not "reject" Dr. Emont's findings but
10 merely used the more restrictive RFC findings from the State Agency
11 doctor to demonstrate that, even considering the more restrictive
12 RFC, Plaintiff was not disabled.

13
14 In sum, the ALJ did not err by crediting the opinions of Dr.
15 Emont or the State Agency doctor. As such, Plaintiff is not
16 entitled to relief on this claim.

17
18 **C. The ALJ Properly Summarized And Weighed Plaintiff's Subjective**
19 **Complaints Testimony**

20
21 Plaintiff contends that the ALJ failed to properly consider
22 her testimony regarding her subjective symptoms and medication side
23 effects. (Jt. Stip. at 14-15). The Court disagrees.

24
25 In assessing the credibility of a claimant's subjective
26 complaints testimony, an ALJ must first determine whether the
27 claimant produced medical evidence of an underlying impairment
28 which is reasonably likely to be the cause of the alleged pain.

1 Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir. 1991) (citing
2 Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986)). Objective
3 medical evidence is required to establish the underlying
4 impairment, but not the severity of the pain. Id.

5
6 The ALJ must then assess the "credibility of the claimant's
7 testimony regarding the severity of symptoms." Smolen, 80 F.3d at
8 1281. An ALJ "cannot be required to believe every allegation of
9 disabling pain." Orteza v. Shalala, 50 F.3d 748, 750 (9th Cir.
10 1994) (quoting Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)).
11 However, an ALJ may not reject a claimant's subjective complaints
12 based solely on lack of objective medical evidence to fully
13 corroborate the alleged severity of pain, if the claimant has
14 produced some objective medical evidence of an underlying
15 impairment. Rollins v. Massanari, 261 F.3d 853, 856-57 (9th Cir.
16 2001).

17
18 If the ALJ finds the claimant's pain testimony not to be
19 credible, the ALJ "must specifically make findings that support
20 this conclusion," and the findings "must be sufficiently specific
21 to allow a reviewing court to conclude the [ALJ] rejected [the]
22 claimant's testimony on permissible grounds and did not arbitrarily
23 discredit the claimant's testimony." Id. If there is no
24 affirmative evidence that the claimant is malingering, the ALJ must
25 provide clear and convincing reasons for rejecting the claimant's
26 testimony regarding the severity of the symptoms. Id.

1 Despite finding that Plaintiff had conditions that could
2 produce pain and symptoms, the ALJ found Plaintiff's claims of
3 excess pain and functional limitations "not fully credible." (AR
4 18-19). The reasons cited by the ALJ for discrediting Plaintiff
5 were: (1) that Plaintiff's reported activities were inconsistent
6 with her claim of disabling limitations (AR 18); (2) that Plaintiff
7 had been "conservatively" treated for her condition, and that she
8 did not have a "regular prescription" for narcotic pain medication
9 (AR at 19); and (3) that Plaintiff did not seek continuous
10 treatment. (AR 19). Each of these factors provide a legitimate
11 basis for discounting Plaintiff's subjective pain complaints and
12 constitute clear and convincing reasons for finding Plaintiff "not
13 fully credible."

14
15 The ALJ observed that Plaintiff makes her bed, shops, and does
16 laundry. (AR 18). This is consistent with Plaintiff's testimony
17 that she "spreads [her bed] up sometimes," that she does laundry
18 with her husband's help, and that she goes food shopping "maybe
19 once a month with [her] husband." (AR 235). The ALJ also stated
20 that Plaintiff "gets together with family members." (AR 18).
21 Moreover, Plaintiff's other activities identified included
22 watching TV, reading, writing, and talking on the telephone.
23 (Id.). These observations support the ALJ's finding that
24 participation in these activities showed a that Plaintiff had the
25 ability to perform work activities within the parameters of the
26 ALJ's functional assessment.

1 The ALJ also cited "conservative treatment" as a basis for
2 rejecting Plaintiff's testimony. (AR 16, 19). Conservative
3 treatment may properly be considered in the credibility analysis
4 because it suggests "a lower level of both pain and functional
5 limitation." Johnson, 60 F.3d at 1433.

6
7 The ALJ also noted "gaps" in Plaintiff's medical treatment
8 that he stated reflected a "failure to seek continuous treatment,"
9 and therefore caused the ALJ "to doubt [Plaintiff's] complaints."
10 (AR 19). A failure to seek treatment is a factor for the ALJ to
11 consider in his credibility analysis. See Flaten, 44 F.3d at 1464
12 (holding, where claimant had sought treatment for back pain on only
13 two isolated occasions, that "the ALJ was entitled to draw an
14 inference" from the lack of medical care).

15
16 The Court also disagrees with Plaintiff's contention that the
17 ALJ failed to properly consider the side effects of her
18 medications. In her disability report, Plaintiff noted several
19 side effects from medications she was taking. (AR 74). At the
20 hearing, the ALJ heard testimony from the Plaintiff that Vicodin,
21 a narcotic pain medication, makes her sleepy, and that she takes
22 daytime naps of two to three hours. (AR 247-48). As the ALJ
23 pointed out, there was no medical evidence in the record regarding
24 any medication side effects. (AR 19). The absence of any mention
25 of side effects in the medical evidence permitted the ALJ to reject
26 any testimony from Plaintiff regarding such effects. See Miller v.
27 Heckler, 770 F.2d 845, 849 (9th Cir. 1985)(requiring clinical
28 evidence to support claims of impairment from drug side effects);

1 see also Osenbrock, 240 F.3d at 1164 (finding no substantial
2 evidence of impairment from medicine's side effects where the
3 record contained "passing mentions of the side effects of
4 [claimant's] medication in some of the medical records, but there
5 was no evidence of side effects severe enough to interfere with
6 [claimant's] ability to work"). The Court cannot conclude that the
7 ALJ's failure to make specific findings regarding any side effects
8 of Plaintiff's medication was error.

9
10 In sum, the ALJ's reasoning that Plaintiff's reported
11 activities were inconsistent with her claim of disabling
12 limitations (AR 18), that Plaintiff had been "conservatively"
13 treated for her condition, that she did not have a "regular
14 prescription" for narcotic pain medication (AR 19), and that
15 Plaintiff did not seek continuous treatment (Id.), provided clear
16 and convincing grounds to find Plaintiff not credible. As such,
17 Plaintiff is not entitled to relief on this claim.

18
19 **D. The ALJ's RFC Findings Are Supported By Substantial Evidence**
20 **In The Record**

21
22 Plaintiff argues that had the ALJ properly weighed Dr. Hunt's
23 opinion or credited Plaintiff's testimony, he would have found
24 Plaintiff disabled. (Jt. Stip at 18-19). This claim lacks merit.

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1 The ALJ made the following RFC findings:

2
3 [T]he [Plaintiff] was limited by an inability to lift
4 more than ten pounds, by an inability to stand or walk
5 longer than 2 hours in an 8-hour work day, by an
6 inability to sit longer than 6 hours in an 8-hour work
7 day, by an inability to do more than occasional stooping,
8 kneeling, crouching, or crawling, by an inability to
9 climb ladders, ropes, and scaffolds, by an inability to
10 do more than occasional climbing of ramps or stairs,
11 balance, and by a need to use an assistive device for
12 walking long distances.

13
14 (AR 16).

15
16 The ALJ's RFC findings are supported by substantial evidence
17 in the record including the opinions of examining physician Dr.
18 Emont and a State Agency doctor. As previously discussed, Dr.
19 Emont conducted a physical examination and a musculoskeletal
20 assessment of Plaintiff. She observed that Plaintiff walked into
21 the examining room without any assistance, although she did have
22 spasm and mild tenderness in her back. (AR 207). An x-ray
23 revealed moderate discogenic disease at L4-L5. (AR 211). The ALJ
24 ultimately adopted the State Agency doctor's more restrictive RFC
25 findings. (AR 15-16). However, the State Agency doctor's opinion
26 was consistent with Dr. Emont's determination. Moreover, the ALJ
27 only adopted the more restrictive RFC to give "the [Plaintiff] the
28 benefit of the doubt[.]" (AR 15).

1 In addition, the ALJ considered Plaintiff's "conservative
2 treatment" and "gaps" in treatment in assessing Plaintiff's
3 functional limitations. (AR 16, 19). Conservative treatment may
4 properly be considered in the credibility analysis because it
5 suggests "a lower level of both pain and functional limitation."
6 Johnson, 60 F.3d at 1433; see also Flaten, 44 F.3d at 1464
7 (holding, where claimant had sought treatment for back pain on only
8 two isolated occasions, that "the ALJ was entitled to draw an
9 inference" from the lack of medical care).

10
11 As previously discussed, the ALJ properly rejected Dr. Hunt's
12 opinion and properly found Plaintiff not fully credible. As such,
13 the ALJ's RFC findings are supported by substantial evidence in the
14 record including the findings of Dr. Emont and the State Agency
15 doctor and Plaintiff's treatment history. As such, the ALJ
16 committed no error in his RFC determination.

17
18 **CONCLUSION**
19

20 Consistent with the foregoing, IT IS ORDERED that Judgment be
21 entered AFFIRMING the decision of the Commissioner and dismissing
22 this action with prejudice. The Clerk of the Court shall serve
23 copies of this Order and the Judgment on counsel for both parties.
24

25 DATED: June 25, 2007
26

27 _____/s/
28 SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE